Sime Securities Sdn Bhd (formerly known as UMBC Securities Sdn Bhd) v Wong Kok Wah

HIGH COURT (KUALA LUMPUR) — SUIT NO D8(D5)22–605 OF 1995
ABDUL WAHAB SAID AHMAD J
26 APRIL 2005

Securities — Remisier — Relationship with stockbroking company — Liability to indemnify stockbroking company — Defendant denied receiving demand for losses incurred — Whether defendant effectively notified

Securities — Shares — Whether plaintiff ought to force sell shares within T+8 under all circumstances — Whether plaintiff entitled to use its discretion to sell shares

The plaintiff is a stockbroking company. By a written agreement ('the said agreement'), the defendant accepted the appointment as agent of the plaintiff to trade and deal in stocks and shares in the name of the plaintiff. Pursuant to the said agreement, the defendant agreed that he shall indemnify the plaintiff against all losses, liabilities, claims and demands that may be suffered or incurred in connection with or arising from transactions in securities dealt through the defendant. Losses were incurred in the accounts under the care of the defendant. The defendant incurred contra losses. The plaintiff used the defendant's deposit and commission to reduce the losses in the client's accounts. The plaintiff prayed against the defendant for contra losses, outstanding purchase prices; and late payment charges. The issues to be tried were, *inter alia*: (a) whether a letter of demand ought to precede the plaintiff's claim; (b) if the answer was in the positive, whether the plaintiff made a demand; (c) in respect of contra losses which have accrued, whether the plaintiff ought to force sell the shares within T+8 under all circumstances; and (d) whether the plaintiff is entitled for late payment charges and correctness of that claim.

Held, dismissing the defendant's counterclaim with cost:

(1) The defendant's relationship with the plaintiff was contractual in nature. The defendant was well aware of the demand made on him. What the defendant had done was merely deny receipt of the letter of demand, besides each and every single document that was relevant to this claim. As long as the defendant had been effectively notified, it matters not if it was served on him at some other address (see para 48).

(2) The failure to sell the shares before T+8 did not invalidate the contract between the plaintiff and the defendant (see para 49); *Theresa Chong v Kin Khoon & Co* [1976] 2 MLJ 253 followed. The plaintiff was entitled to use its discretion to sell those shares as long as he acted *bona fide* (see para 50).

(3) The defendant was estopped from denying those transactions had been made by him as remisier to those relevant account holders. Neither the accountholders themselves had made any complaint in respect of those transactions handled by defendant. The tradings were done by the defendant and the resulting losses suffered in those accounts (see para 53).

(4) From the evidence, the defendant had never been notified of the interest rate on late payment charges or its variations. The said agreement allowed the plaintiff to charge late payment charges at a rate to be notified or vary the rate of late payment charges by serving a notice on the remisier. No evidence led by to show this written notification disentitling the plaintiff for the said amounts (see para 58).

[**Bahasa Malaysia summary**

Plaintif adalah sebuah syarikat stok saham. Melalui satu perjanjian bertulis ('perjanjian tersebut'), defendan menerima pelantikan sebagai ejen plaintif untuk memperdagangkan dan mengendalikan stok dan syer atas nama plaintif. Menurut perjanjian tersebut, defendan bersetuju bahawa beliau akan mengindemnifikan plaintif terhadap semua kerugian, liabiliti dan tuntutan yang mungkin dialami atau ditanggung berkaitan atau yang timbul daripada transaksi sekuriti yang diuruskan melalui defendan. Kerugian ditanggung dalam akaun-akaun di bawah jagaan defendan. Defendan telah menanggung kerugian kontra. Plaintif telah menggunakan deposit dan komisyen defendan untuk mengurangkan kerugian dalam akaun-akaun pelanggan. Plaintif memohon terhadap defendan untuk kerugian kontra tersebut, baki harga-harga belian; dan caj bayaran lewat. Persoalan-persoalan yang perlu dibicarakan adalah, *inter alia:* (a) sama ada surat tuntutan patut menyusul sebelum tuntutan dibuat oleh plaintif; (b) jika jawapannya positif, sama ada plaintif telah membuat suatu tuntutan; (c) berkaitan kerugian kontra yang terakru, sama ada plaintif patut memaksa jual syer-syer dalam T+8 di bawah apa keadaanpun; dan (d) sama ada plaintif berhak kepada caj bayaran lewar dan ketepatan tuntutan tersebut.

Held, menolak tuntutan balas denfendan dengan kos:

(1) Hubungan antara defendan dan plaintif bersifat kontraktual. Defendan sedar tentang tuntutan yang dibuat terhadap beliau. Apa yang dilakukan oleh hanyalah menafikan penerimaan surat tuntutan, selain daripada setiap satu dan semua dokumen yang relevan dengan tuntutan ini. Selagi defendan dimaklumkan secara efektif, ia tidak kira jika ia disampaikan ke atasnya alamat lain (lihat perenggan 48).

(2) Kegagalan untuk menjual syer-syer sebelum T+8 tidak menjadikan kontrak antara plaintif dan defendan tidak sah (lihat perenggan 49); *Theresa Chong v Kin Khoon & Co* [1976] 2 MLJ 253 diikut. Plaintif berhak untuk menggunakan budi bicaranya untuk menjual syer-syer tersebut selagi beliau bertindak secara bona fide.

(3) Defendan diestopkan daripada menafikan transaksi-transaksi tersebut telah dibuat oleh beliau sebagai remisier kepada pemegang-pemegang akaun yang berkaitan. Pemegang-pemegang akaun tersebut tidak membuat apa-apa aduan berkaitan transaksi yang dikendalikan oleh defendan. Dagangan tersebut dikendalikan oleh defendan dan kerugian akibatnya dialami dalam akaun-akan tersebut (lihat perenggan 53).

(4) Berdasarkan keterangan, defendan tidak pernah dimaklumkan tentang kadar faedah ke atas caj bayaran lewat atau perubahannya. Perjanjian tersebut membenarkan plaintif mencajkan caj bayaran lewat pada kadar yang akan dimaklumkan atau mengubah kadar caj bayaran lewat dengan menyampaikan notis ke atas remisier. Tiada keterangan dikemukakan untuk menunjukkan pemakluman bertulis ini tidak memberi hak kepada plaintif untuk jumlah tersebut (lihat perenggan 58).]

Notes

For cases on remisier's relationship with stockbroking company, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 876–878.

For cases on shares generally, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 882–913.

Cases referred to

Associated Asian Securities Pte Ltd v Lee Kam Wah [1993] 1 SLR 585
TA Securities Bhd v Lee Wai Ping [1999] MLJ 394
Theresa Chong v Kin Khoon & Co [1976] 2 MLJ 253 (folld)
UMBC Securities Sdn Bhd v Tan Chee Aan [2001] 3 MLJ 410 (refd)

S Rajita (Skrine) for the plaintiff.
KL Ng (Shui-Tai)for the defendant.

Abdul Wahab Said Ahmad J:

[1] The plaintiff is a stockbroking company. By a written agreement dated 28 December 1993, the defendant accepted the appointment as agent of the plaintiff to trade and deal in stocks and shares in the name of the plaintiff. Pursuant to the said agreement, the defendant agreed that he shall indemnify the plaintiff against all losses, liabilities, claims and demands that may be suffered or incurred in connection with or arising from transactions in securities dealt through the defendant.

[2] Losses were incurred in the accounts under the care of the defendant. As at 25 August 2000, the defendant incurred contra losses. The plaintiff used the defendant's deposit and commission to reduce the losses in the said client's accounts. The plaintiff prays against the defendant for:

(a) contra losses for the sum of RM250,258.41;

(b) outstanding purchase price for the sum of RM26,559.58;

(c) purchase price for one purchase contract for the sum of RM19,017.20;

(d) late payment charges amounting to RM103,342.86 as at 31May 1995;

(e) late payment charges amounting to RM158,831.34 from 1June 1995 to 25 August 2000;

(f) late payment charges on RM295,835.30 at the rate of 12% per annum from 26 August 2000 until full and final payment; and

(g) costs.

[3] The defendant counter claimed for:

(a) return of deposit of RM50,000;

(b) commission at 40% (before statutory deduction); and

(c) return of the defendant's remisier's licence.

[4] The issues to be tried are:

(a) Whether a letter of demand ought to precede the plaintiff's claim;

(b) If the answer is in the positive, whether the plaintiff made a demand.

(c) In respect of contra losses which have accrued:

(i) whether the plaintiff ought to force sell the shares within T+8 under all circumstances;

(ii) whether the contra losses have been reduced fully by way of set off from the defendant's commission and deposit;

(d) the accuracy of the contract notes and contra statements;

(e) the correctness of the plaintiff's claim under the prayers (b) and (c) of the amended statement of claim;

(f) whether the plaintiff is entitled for late payment charges and correctness of that claim.

[5] During the trial, three witnesses gave evidence on behalf of the plaintiff. PW1, Pn Rokayah bte Mohamed Mustapha gave evidence about the agency agreement to show that the defendant was a remisier with the plaintiff. The agency agreement provides that the defendant would indemnify the plaintiff for all losses arising from his client's accounts.

[6] PW1 gave evidence on the duties of the defendant as a remisier. She said that the trades executed by the defendant on behalf of his clients were followed by the issuance of the Daily Business Done Report and the Client

Outstanding Position Report to the defendant as written confirmation. PW1 elaborated on the plaintiff's claim against the defendant under the various heads. Supporting documents under each head were referred to. Evidence was given on the accrual of these claims. PW1 also testified about the late payment charges.

[7] PW1 stated that the clients and the defendant had never disputed the purchases despite the clause in the contract notes that entitled them to dispute within 24 hours of receipt of the contract notes. PW1 also testified that the defendant, having been given the Client Outstanding Position Report and the Business Done Report, did not dispute any of the transactions. PW1 subsequently testified that that the plaintiff had issued two memos to the defendant notifying him of the outstanding amount in his clients' accounts. The plaintiff demanded that the defendant make payment for the said outstanding amount. The plaintiff's letter of demand was dated 6 July 1995.

[8] PW2, Ms Wong Wai Yuan is the plaintiff's accounts' executive. PW2 testified that her job was to prepare the summary of the remisier's commission earnings. PW2 prepared the commission earnings based on the documents before her and her knowledge of those documents. PW2 testified as to how much of the commissions belonging to the defendant have been set off and against which of those losses. PW2 gave evidence on every contract note and contra statement. PW2 showed how the defendant's commissions were set off against his losses. These do not appear in the statement of claim.

[9] PW3, Mr Devaraj Mahmundy gave evidence on the clients' accounts forming the subject matter of this claim. The clients are Lim Ann, Chi Kuang, Tong Lai Phin and Lim Soh Moi. PW3 testified that during the ordinary course of business a remisier receives Client Outstanding Position Reports and Daily Business Done Reports. PW3 then testified that exh P10, the statement of accounts previously tendered was not entirely correct and PW3 proceeded to tender the revised statement of accounts as at 25 August 2000 that was prepared based on:

(a) the Client Outstanding Position Report as at 25 August 2000; and

(b) Contra Statements and Contract Notes.

[10] PW3 testified that the figures stated in the statement of accounts, P22, has been verified against P23 and P4 and tallies with that pleaded in the statement of claim, save for the late payment charges which exceeds that claimed for in the amended statement of claim. PW3 then proceeded to explain the amended contracts and the circumstances giving rise to them, namely that the amendments were made pursuant to the request from the remisier. PW3 also referred to all contract notes that showed a change of name in relation to the different counters.

[11] PW3 said that the interest levied on the transactions and the plaintiff's entitlement to charge interest is known to the defendant through cl 7.3(b) of the agency agreement (P2) and through the Client Outstanding Position Report (P23). PW3 also testified that the clients were aware of the interest charged through the monthly statement issued to them.

[12] The defendant gave his own testimony and did not call any further witnesses. On issue (a) of the issues to be tried, the defendant referred to cl 7.3 of the agency agreement, which provides that the defendant's liability arises upon a demand being made to him by the plaintiff. Further, cl 16 of the agency agreement provides that the notice of demand shall be in writing and addressed to the defendant at his last known residential address, sent by hand or post. The defendant contended that the service of the plaintiff's letter of demand ('P13 and P–13a') dated 6 July 1995 was bad in law because it was addressed and posted not to the defendant's residential address but to the plaintiff's own office address. The plaintiff's memos ('P–11' and 'P–12') were not issued in compliance with cl 16 as they are not addressed and posted to the Defendant's residential address.

[13] On issue (f), whether the plaintiff is entitled to late payment charges and correctness of the claim, the defendant referred to cl 7.3(b) of the agency agreement. The said provision provides that the plaintiff may charge late payment interest on the defendant. However to charge such interest, the plaintiff must notify the defendant about it. The defendant alleged that the plaintiff failed to prove what the interest rate was, when it started to accrue and whether the defendant was informed about it.

[14] The defendant went on to examine each client's account as adduced in the plaintiff's evidence. In reference to the account of Lim Soh Moi, the defendant said that PW1 gave evidence that interest accrued under the statement of account was RM16,087.78 as at 25 August 2000 while the amount stated in the Client's Outstanding Position Report was RM21,607.73 as at 25 April 2000. The defendant said that the PW1 was merely making an assumption in explaining why earlier the higher interest rate was higher by saying that Lim Soh Moi had paid off the difference.

[15] The same goes for the accounts of Lim Ann, Liew Chee Kuang and Tong Lai Phin. The defendant alleged that the plaintiff failed to show why interest accrued at an earlier date could be higher than that of a later date.

[16] The defendant alleged that the plaintiff has failed to show how it has obtained the sum of RM103,342.86 accrued as at 31 May 1995 in prayer (d)of the amended statement of claim. The defendant referred to PW1's testimony that there could be an error in calculation and PW3's revised statement of account. The defendant said that the earlier statement of account was prepared and certified by two officers. Even then there was an error. So there was no guarantee that there would not be any error for the second one. The defendant

further claimed that not only does the two statements of accounts contradict one another, there are errors in both the Client's Outstanding Position Report as at 25 April 2000 and 25 August 2000. For instance, the amounts stated in Lim Soh Moi's Report were the same for both dates, whereas for Lim Ann, there was an increase.

[17] On issue (d), the accuracy of the contract notes and contra statements, the defendant said that the contract notes and contra statements, the documents on which the plaintiff's claim of RM250,258.52 was based on, was never sent to the defendant. As such the defendant alleged that he was never given the chance to verify the losses arising from those transactions. The defendant said that D–24 were not duplicates of the actual originals that would have been sent to the defendant's customer. They were copies specially reprinted from the plaintiff's computer system to be used for this suit. This is because the plaintiff's name was changed from UMBC Securities sometime in 1995. Hence the plaintiff could not have sent out those documents bearing 'Sime Securities Sdn Bhd' at that material time.

[18] The defendant also raised about the two remisier codes, D2W and R63. He said that the code allocated to him was R63. Therefore he claimed that transactions made under D2W were not his. He said that the plaintiff could not explain why in exh P–29, the defendant's transaction on the same day could be in two different codes, both D2W and R63.

[19] The defendant also referred to amendments on transactions that he carried out. The plaintiff never informed him of the amendments. The defendant said that the PW3 was evasive in his answers on this. This is in view of the fact that there are many discrepancies in the contract notes and contra statements. The plaintiff's decision not to tender the duplicates or copies of the originals of the above documents does not help in dispelling the doubt about this issue.

[20] The defendant alleged that the plaintiff in relation to contra loss under contra statement no TC434726 has wrongly billed the defendant for transactions done in other customers' accounts. This is attributed by the incidence of two different codes for one customer, Liew Chi Kuang as evident from the contract notes contained in p 31 Bundle B.

[21] The defendant contended that the plaintiff is not entitled to merely produce the print out of the monthly Client's Outstanding Position Report when it has failed to produce the originals of the Business Done Reports and the Client's Outstanding Position Reports. The defendant, referring to the Client's Outstanding Position Report as at 21 November 1995 ('D–25') said that the report shows that the defendant's customer Chan Kwee Ming does not owe the plaintiff any money save and except for late payment interest. However the last entry in the report shows that there was a transaction dated 13 September 1993 for a sum of RM2,751.06.

[22] Further, in trying to establish that the plaintiff has failed to prove its claim of RM250,258.52 in prayer (a) of the statement of claim, the defendant said that the counters shown in the above report differs from that in the contract notes and contra statements. Even though the plaintiff has testified that the difference is due to the change of names and counters, the plaintiff could not explain why the contract notes and contra statements, being printed at a later date could bear differing names and not the alleged new names.

[23] If the court finds that prayer (a) is proven, the defendant urged the court to consider reducing the losses from RM250,258.52 to RM153,388.52. The defendant said that this is in view of the fact that the plaintiff has failed to mitigate its losses by not selling the unpaid shares of the defendant's customers on the eighth trading day after the same had been purchased (T+8), in contravention of the KLSE's regulations.

[24] On issue (e), the defendant said that the plaintiff's claim under prayers (b) and (c) of the statement of claim are defective, wrong and should not be allowed. The defendant further stated that it is inequitable for the plaintiff to claim for the full price of the purchase without taking into account the monies it has received from the sale of shares.

[25] Lastly, on issue (c)(ii), the defendant said that he has paid the security deposit of RM50,000 as required in cl 3.1 of the agency agreement. The defendant claimed that the plaintiff is still keeping the said deposit and has not deducted and set-off the same against the losses claimed by the plaintiff.

[26] Referring to transactions made under the code D2W, a total of RM115,514.38 was deducted and set-off from the defendant's commission for transactions made under the said code. Since the transactions could not have been carried out by the defendant the said sum should be credited back into the defendant's account and be used to deduct and set-off against the losses as claimed by the plaintiff in this suit under prayer 9 (a), (b) and (c) of the amended statement claim.

[27] In its reply on issue (a), the plaintiff said that the defendant has denied receiving the letter of demand but admitted to receiving documents pertaining to his commissions and brokerage addressed to the defendant at the same address. It is inherently improbable for the defendant to have received the commission and brokerage statements and not the letter of demand.

[28] On issue (f) the plaintiff said that the plaintiff is entitled to claim for late payment charges as provided by cl 7.3 of the agency agreement. It reads:

> the remisier hereby undertakes to pay the company on demand…
>
> (b) the company shall be entitled to charge late payment charges and service charge on all overdue amounts of the remisier and those of his clients ...
>
> Provided always the company may vary the rate of late payment charges above mentioned by serving a notice stating the same on the remisier....

[29] The agency agreement provides that the defendant indemnify the plaintiff for the losses in his clients' accounts. The plaintiff said that since the defendant had not challenged the execution of the agency agreement, he does not dispute the indemnity clause. The plaintiff explained that the clause arose out of the nature of the relationship between the plaintiff and defendant, ie that of an agent and principal.

[30] The plaintiff reiterated that it has the right to impose late payment charges. That right arose out of the Agreement. The Plaintiff, through PW1 has verified that the interest or late payment charges appear both in the Client's Outstanding Position of the defendant and the monthly statements of the respective clients.

[31] According to the plaintiff, the defendant was notified by way of the Client Outstanding Position Report. The plaintiff explained that no evidence was given as to how interest has accrued on an earlier date for the accounts of Lim Ann, Liew Chee Kuang and Long Lai Phin because questions were not put to the plaintiff's witnesses on that issue. The defendant had not challenged the late payment charges in the revised Statement of Accounts. No challenge was made on the accuracy of the late payment charges or its calculation or the manner in which such figure is derived from despite the statement of accounts being tendered.

[32] As for the defendant's contention that the plaintiff's statement of account is inaccurate, the plaintiff said that PW3 had explained the difference in the interest rate. He tendered the revised statement of accounts, P22, which was verified against the Client Outstanding Position Report, P23 and the contract notes and contra statements. The plaintiff said that by virtue of the defendant's evidence, the defendant was well aware of the transactions and the interest accruing thereon from the Client Outstanding Position Reports.

[33] On issue (d), the plaintiff said that contra notes and contra statements are not sent out to remisiers. They are sent to the clients of the respective broking houses. The defendant is aware of this practice. The plaintiff, referring to the defendant's evidence during the trial said that the defendant's argument that he has not been accorded the opportunity to dispute the transactions in the contract notes and the monthly statements is baseless. This is because the defendant had testified that he goes to the Credit Control Department daily to check his transactions. He also admitted that he was aware of all the transactions that he instructed in his clients' behalf.

[34] As for the letterheads, the contract notes and contra statements bearing 'UMBC Securities Sdn Bhd' and 'Sime Securities Sdn Bhd'; the plaintiff said that the plaintiff had explained and the defendant himself has confirmed a change of the plaintiff's name during the course of the trading period.

[35] As for the defendant's contention that upon being confirmed as a remisier, his code changed from D2W to R63 and as such, all transactions were not carried out by him, his testimony shows otherwise. The defendant would have realised that the transactions were not carried out by him on behalf of the clients and would have there and then disputed the transactions. This is because the defendant had testified that he checks his transactions on a daily basis by going through the computer system at the Credit Control Department. Further, a request form dated 23 September 1994 ('P20') bears the D2W code and the defendant's signature. During cross-examination the defendant admitted that code R63 and D2W was being used by him. He utilised both codes, so the issue is no longer relevant.

[36] As for the amended contracts, the plaintiff had explained through PW3 that the amended contracts are carried out pursuant to the request of the remisier. Having checked his transactions on a daily basis, the remisier would be in a position to inform the plaintiff if there are any errors.

[37] On the defendant's contention that the contract notes and contra statements are inaccurate as they contain two different client codes for one client, the plaintiff's explanation is that the particulars of the client remain the same and there was no dispute by the client or accountholder regarding the said transaction.

[38] The defendant claimed that the contract notes and contra statement are inaccurate as a married deal was transacted and the defendant had not executed it. However, the defendant had not challenged the plaintiff's testimony regarding the inaccuracy of the contract notes as a result of the execution of the married deal and the non-execution of this transaction by the defendant. No challenge was made on the plaintiff's testimony with regards to the execution of the married deal.

[39] By alleging that the contract notes and contra statement are inaccurate, the plaintiff said that the defendant had merely raised technical errors and denied the transactions. The defendant was said to have not provided any basis for the denial of these transactions and had not challenged each transaction in respect of the execution of the transaction, its quantity, amount or the counter.

[40] The plaintiff said that the Client Outstanding Position Report that was relevant to the plaintiff's claim was produced and it has not been challenged by the defendant. Since the Client Outstanding Report and the Daily Business Done Report had been given to the defendant, the plaintiff said that it is not obliged to produce each and every one of them. Furthermore, the defendant in his notice to produce documents has not requested for production of each and every one of the said documents. The plaintiff further submitted that the statement of accounts, P22, had not been challenged by the defendant and that he has failed to show how the Client Outstanding Report, a computer generated document is flawed. As for the issue pertaining to the accountholder

Chan Kwee Min, the plaintiff submitted that Chan Kwee Ming does not form part of the claim.

[41] On issue (c)(i), the plaintiff referred to the case of *UMBC Securities Sdn Bhd v Tan Chee Aan* [2001] 3 MLJ 410, where it was stated that '… selling shares on dates later than the T+8 period had not contravened the (Securities Industries Act) or any other law ....' 'In any event the plaintiff is given the liberty vide the remisier's agreement and the client's account form to dispose off the shares in the manner the plaintiff deems at an appropriate price'.

[42] The plaintiff said that the manner of calculation and reduction of losses should the shares have been sold before T+8 was not put to the plaintiff's witnesses. The plaintiff submitted that a breach of the KLSE rules does not invalidate a contract between the defendant and the plaintiff or any contract or share transaction entered into by the said clients of the defendant. To illustrate the point that breach of the KLSE rules does not have any effect legally, the plaintiff cited *inter alia*, *TA Securities Bhd v Lee Wai Ping* [1999] MLJ 394. It was stated in that case that '... in any event even if there is a breach of the ruling, breach does not have the force of law rendering the transaction illegal and/or void'.

[43] Further it was stated in *Theresa Chong v Kin Khoon & Co* [1976] 2 MLJ 253 where Wan Hamzah J said '... the rules and by laws did not have the force of law to render illegal or void a contract between a member and a remisier or between a remisier and buyers of shares, for failure to comply with the rules or by laws'.

[44] On issue (e), that the plaintiff's claim under prayers (b) and (c) of the amended statement of claim are incorrect, the plaintiff said that the defendant has not provided any evidence to support the contention and that this point was not put to the plaintiff's witnesses. Under this argument, again, the defendant referred to a contract executed by the defendant on behalf of Chan Kwee Ming, whose account forms no part of this claim. As to the allegation that the central buyer may have keyed in the transactions wrongly upon the defendant handing over the Daily Business Done Report, any error would have been detected by the Defendant, since he had stated that he was given the Daily Business Done Report to check the transactions.

[45] Finally, on issue c(ii), the plaintiff said that the initial deposit of RM100,000 has been set off against his losses. The plaintiff further stated that since the defendant has executed P20, bearing the code D2W for the purpose of deducting his commissions, the defendant cannot argue that transactions under D2W are not his. As for bundle K, the plaintiff said that the transactions in the said bundle does not form part of the claim and have already been set off against the commissions of the defendant.

[46] Having heard all the evidence given in the form of oral testimonies of witnesses and arguments of learned counsels on both sides, I decided that the plaintiff has established the defendant's liability to indemnify the plaintiff for the outstanding losses in his client's accounts and gave judgment in the plaintiff's favour. I state my reasons herein below.

[47] The defendant's relationship with the plaintiff is contractual in nature. The agreement contains an indemnity from the defendant to the plaintiff in which it says that the defendant would settle all losses arising from his clients' accounts. I observe that the plaintiff's witnesses were forthright and consistent in their testimonies.

[48] PW1 had given evidence that the plaintiff issued a letter of demand through its solicitors on 6 July 1995 and that the amounts claimed are still due and owing. PW1 testified that the plaintiff had earlier issued two memos to the defendant notifying him of the outstanding amount in the clients' accounts and demanded that the defendant make payment. I find from the evidence that the defendant is well aware of the demand made on him. What the defendant had done is merely deny receipt of the letter of demand, besides each and every single document that is relevant to this claim. While there is no argument that the letter of demand should indeed precede the plaintiff's claim, I am satisfied that the demand was sent to the defendant and the defendant was aware of the demand made upon him. Clause 16 is only a deeming clause that if it was sent to the defendant's residential address it would be an effective service and deemed notified to defendant. I am satisfied that the demand made vide letter dated 6 July 1995 had been effectively served at office address. In fact the memos by the plaintiff P(11) dated 18 April 1995 and P(12) dated 4 May 1995 were also effective notice of demand granting the defendant seven days to pay up or face legal action. As long as the defendant had been effectively notified as in our case, it matters not if it was served on him at some other address. I hold the letter of demand and memos were valid demand made on the defendant.

[49] In respect of contra losses which have accrued, I agree with the plaintiff's learned counsel that failure to sell the shares before T+8, being a breach of KLSE rules, does not invalidate the contract between the plaintiff and the defendant. On this point, I would like to quote with approval a passage from the judgment of Wan Hamzah J in *Theresa Chong v Kin Khoon & Co* [1976] 2 MLJ 253:

> The rules and by laws of the Stock Exchange were binding on the members of the Stock Exchange. A member of the Stock Exchange who contravened the rules and by laws would be liable to penalties provided in the rules or by laws, but the rules and by laws did not have the force of law to render the illegal or void a contract between a member and a remisier or between a remisier and buyers of shares for failure to comply with rules or by laws.

[50] On whether plaintiff should take all reasonable steps to mitigate the loss, plaintiff is entitled to use its discretion to sell those shares as long as he acts *bona fide*. In any event it should be the account holders who should have complained and be called to show otherwise and not the defendant whose liability is under the indemnity.

[51] I accept the evidence of the plaintiff's witnesses that the initial deposit of RM100,000 has been set off against the defendant's losses and that the defendant is well aware of this. I do not accept the defendant's contention that the claim should be reduced as transactions under the code D2W were not made by him. The evidence show that the defendant had himself used that code in requesting that the plaintiff deduct his commissions.

[52] I find that the defendant's arguments disputing the contract notes and contra statements are untenable in the face of his own evidence before the court. He had given evidence that he goes to the Credit Control Department to check his transactions daily and that he would know if there were any contra losses incurred by his clients. It is most peculiar that he would receive documents pertaining to his commissions earned and deducted but not documents relating to his transactions. I also find his arguments on the difference in the letterheads of the contract notes and contra statements immaterial as the change of name from 'UMBC Securities Sdn Bhd' to 'Sime Securities Sdn Bhd' is well within his knowledge and that is just stating the obvious. The defendant's arguments on the difference between the codes, as mentioned earlier is also untenable as his own evidence show that his daily checks at the Credit Control Department would have revealed any discrepancies.

[53] Defendant had said that during normal trading day he will be informed by central buyer. He had to keep a small book to record each transaction. Heagreed that apart from Daily Business Done Report and record book there was no other way to check on the transaction. As he had been diligent as he claimed in his daily check at Credit Control Department he would have known and acted then to query the transaction. His conduct then in not doing so coupled with the fact he had not made any written complaint is consistent with the fact all the transactions recorded were within his knowledge. He is estopped from denying those transactions had been made by him as remisier to those relevant account holders. Neither the accountholders themselves had made any complaint in respect of those transactions handled by defendant. I am satisfied the tradings were done by defendant and the resulting losses suffered in those accounts.

[54] In any event, the defendant had only sought to establish technical errors and alleged discrepancies, which are irrelevant as they do not relate to the transactions. He had, by doing so without basis, merely denied the transactions. Most evident in showing that the defendant has offered nothing more than a mere denial is that he had not delved into the substance of each transaction

in the sense of the execution of each transaction, its quantity, the amount or the counter. He had also not produced the record book which he should have kept to record all the transactions.

[55] I find that there is no substance in the defendant's argument that prayers (b) and (c) of the amended statement of claim are incorrect. The defendant's reasons for so stating are that firstly, the oversold positions are identified by contract number PZ and not P. The defendant had not put this question to the plaintiff's witnesses. There is therefore no evidence to support this contention. The defendant had referred to a contract executed by Chang Kwee Ming yet again, when it is evident that it does not form part of the claim.

[56] There is also no merit in the third argument that the central buyer may have keyed in the details of the transactions wrongly upon the defendant handing the Daily Business Done Report to the central buyer. This is because the defendant had stated in his evidence that he is given the Daily Business Done Report to check the transactions. As such he would have known if any of the entries are wrong. Further, the defendant himself had admitted that he is given the opportunity to verify and check every transaction executed. He would have knowledge if there are any wrong entries and should have raised it with promptitude then. PW3 had tendered the revised statement of accounts (P22) which had been verified against the client outstanding position report (P23) and the contract notes and contra statement. I accept that as proof of defendant's indebtedness.

[57] Under the indemnity clause in the agreement the remisier shall indemnify the stockbroking firm. Such obligation is in consideration of the plaintiff allowing the defendant to introduce and have conduct of the accounts of its clients and thereby earning substantial commissions from the transactions conducted. I take a passage from the judgment of the Singapore Court of Appeal in *Associated Asian Securities Pte Ltd v Lee Kam Wah* [1993] 1 SLR 585:

> ... the contract was drawn up by the appellants and was expressed in very stringent and comprehensive terms from the point of view of the respondent, and the relevant terms providing an indemnity to the appellant were expressed in very wide terms: the respondent agreed to 'indemnify' (the appellants) for any losses or damages arising from any contracts written or transaction entered into by the respondent. The words are sufficiently wide to cover losses arising from any default of the respondents' clients in honouring a *bona fide* and genuine transaction as well as losses arising from fraud or forgery by the respondents' clients.

[58] I find from the evidence that the defendant had never been notified of the interest rate on late payment charges or its variations. Clause 7.3 (b) allowed plaintiff to charge late payment charges at a rate to be notified or vary the rate of late payment charges by serving a notice on the remisier. No evidence led by plaintiff to show this written notification disentitling them for the said amounts.

[59] For the above reasons and based on those finding of facts I was satisfied that plaintiff had on the balance of probabilities proved its case against the defendant for prayers (a), (b) and (c) only of the amended statement with interest at 8% from 10 October 1995 that is date of filing of this writ together with costs. For the same reasons I dismissed the defendant's counterclaim with costs.

Defendant's counterclaim dismissed with cost.

Reported by Peter Ling